89-43

Supreme Court, U.S.
FILED
JUL 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1989

JOHN ERIC HUGHES,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF GEORGIA

PETITIONER'S BRIEF

MELVIN S. NASH
204 Washington Avenue
Marietta, Georgia 30060
(404) 422-0878

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether statements made during a Field Sobriety Test, including, but not limited to, the recitation of the alphabet, should be excluded from trial given that they were elicited by police while the Petitioner was in custody and without the benefit of *Miranda* warnings?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ii

OPINION BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE FIFTH AND FOURTEENTH AMENDMENTS 4

CONCLUSION AND PRAYER 6

APPENDIX A-1

TABLE OF AUTHORITIES

CASES:

Hughes v. State of Georgia, ___ Ga. ___ (Case No. 46585) 1, 3

Schmerber v. California, 384 U.S. 757, 761 (86 S.Ct. 1826, 16 L.Ed.2d 908)(1966) 4

State of Georgia v. Hughes, 189 Ga. App. 671, (377 S.E.2d 192)(1988) 3, 4

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 3, 4

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTIONAL PROVISIONS:

Fifth and Fourteenth Amendments (generally throughout brief and Item I)

STATUTES:

28 U.S.C. Section 1957(3). 1

OPINION BELOW

The opinion of the Supreme Court of the State of Georgia, *Hughes v. State of Georgia*, ___ Ga. ___ (Case No. 46585), affirming in part and reversing in part the decision of the Court of Appeals of the State of Georgia is reproduced in the Appendix, beginning at page A-1.

JURISDICTION OF THIS COURT

The opinion of the Supreme Court of the State of Georgia was decided on May 10, 1989. That Court's decision regarding federal constitutional questions conflicts with applicable provisions of the United States Constitution and decisions of the United States Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution, in relevant part, states as follows:

"No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."

The Fourteenth Amendment to the United States Constitution, in relevant part, states as follows:

"No State shall make or enforce any law which deprive[s] any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Officer J.R. Barner, while off-duty and operating his own vehicle, was forced off the road by the erratic driving of the Petitioner. Officer Barner followed the Petitioner's vehicle and observed Petitioner commit numerous traffic offenses. When Petitioner eventually pulled into the parking lot of an apartment complex and stopped, Officer Barner followed and pulled in behind Petitioner's vehicle. Officer Barner approached Petitioner and identified himself as a police officer. Officer Barner produced his identification. At the request of Officer Barner, bystanders telephoned 911 to relay the report that an officer was in need of assistance in the parking lot of the apartment complex and, within three or four minutes, other officers arrived at the scene. During those few minutes before the other officers arrived, Officer Barner asked Petitioner for his driver's license and he engaged Petitioner in conversation. At one point, Petitioner requested to leave, but Officer Barner informed him that he would not be allowed to do so. Officer Littler, who arrived at the scene in response to Officer Barner's request for assistance, asked Petitioner to perform a field sobriety test which included reciting the alphabet. Based upon Petitioner's performance of those tests and the information supplied by Officer Barner, Officer Littler placed Petitioner under formal arrest for driving under the influence. At no time prior to this formal arrest by

Officer Littler was Petitioner ever advised of his *Miranda* rights.

Prior to trial, Petitioner filed a motion to suppress and a motion in limine. The trial court conducted a hearing and concluded that Officer Barner had "effected an arrest of [petitioner] when he informed [petitioner] that he could not leave the scene of the initial stop." Because Petitioner had not been given his *Miranda* rights at that time, the trial court granted Petitioner's motions, precluding the introduction at Petitioner's trial of any testimony concerning the conversation between Petitioner and Officer Barner which had occurred prior to the formal arrest and of any evidence of the field sobriety tests which had been conducted by Officer Littler prior to the formal arrest. The State appealed from this order of the trial court.

In *State of Georgia v. Hughes,* 189 Ga. App. 671, (377 SE2d 192) (1988), the Court of Appeals of the State of Georgia reversed the judgment of the trial court which had suppressed conversations between Petitioner and the police and all references to field sobriety tests given to Petitioner prior to formal arrest. The Supreme Court granted the writ of certiorari and in *Hughes v. State of Georgia,* ___ Ga. ___ (Case No. 46585, decided May 10, 1989), the judgment of the Court of Appeals of the State of Georgia was affirmed in part and reversed in part. The Supreme Court of Georgia held that "the trial court correctly suppressed reference to conversations between [Petitioner] and the police." *Hughes v. State,* supra. However, the Supreme Court affirmed the Court of Appeals reversal of the trial court's suppression order with regard

to "the alphabet test and the physical dexterity tests." *Hughes v. State*, supra.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH AND SIXTH AMENDMENTS

That part of the Georgia Supreme Court's decision which is being appealed holds, "that the alphabet test and physical dexterity tests were not inadmissable under the fifth amendment of the United States Constitution because they were not evidence of a testimonial or communicative nature." *State of Georgia v. Hughes*, 189 Ga. App. 671, (377 S.E.2d 192) (1988); *Schmerber v. California*, 384 U.S. 757, 761 (86 S.Ct. 1826, 16 L.Ed.2d 908)(1966).

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that a person subjected to custodial interrogation must be warned that he has a right to remain silent, that any statement he does make can be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. The Court further acknowledged that a Defendant may waive these rights, but only if the waiver is made voluntarily, knowingly and intelligently will it render subsequent confessions admissible. The Supreme Court in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) reaffirming the *Miranda* decision stated that "the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications[.]" The Court recognized, however, that "the privilege is a bar against compelling

'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." 384 U.S. at 763-64, 86 S.Ct. at 1832, 16 L.Ed.2d at 916.

The only issue presented for this Court's determination is whether the Fifth Amendment privilege against self-incrimination applies to evidence of statements made during a field sobriety test. This Court must examine whether a Defendant's statements made during a field sobriety test is a communicative act involving that person's testimonial capacities or if it is real or physical evidence which does not fall within the privilege. In this case the officer asked the Petitioner specific questions to which a response from the Petitioner was demanded and, in fact, orally given. Accordingly, any statements obtained from the Petitioner and spoken to the police officer, including the alphabet test, violates the privilege against self-incrimination and therefore must be suppressed.

CONCLUSION AND PRAYER

The Fifth Amendment rights are fundamental, and review is warranted to impose consistency in accordance with this Court's established precedent. This Court's supervisory authority should be exercised to correct the error committed by the Court of Appeals and the Supreme Court of Georgia. Review should be granted, and upon review this case should be remanded for trial in accordance with those issues discussed here.

This the 7th day of July, 1989.

Respectfully submitted by,

MELVIN S. NASH
Counsel of Record for Petitioner
Georgia State Bar #535125

204 Washington Avenue
Marietta, Georgia 30060
(404) 422-0878

APPENDIX

SUPREME COURT OF GEORGIA

ATLANTA May 10, 1989

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JOHN ERIC HUGHES v. THE STATE

It is ordered that this Court's judgment of May 4, 1989, is hereby vacated and a new judgment of affirmed in part and reversed in part, with Marshall, C.J., dissenting to division 1 and the judgment of reversal, be entered.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams Clerk

In the Supreme Court of Georgia

Decided:

46585. HUGHES v. STATE.

GREGORY, Justice.

After observing appellant Hughes' erratic driving, an off-duty police officer pulled behind Hughes' parked car, showed Hughes his identification, called for assistance, and refused to let Hughes leave. After talking with Hughes, the officer asked another officer who had arrived on the scene to give Hughes a sobriety test. The officers then placed Hughes under formal arrest for driving under the influence.

The trial court granted Hughes' motion to suppress. The trial court held that the situation had progressed beyond the point of an investigatory stop and that the officer had effected an arrest when he told Hughes he was not free to leave. Because *Miranda* warnings were not given at that time, the trial court suppressed the conversations and sobriety tests.

In *State v. Hughes*, 189 Ga. App. 671, ___SE2d___ (1988), the Court of Appeals reversed. The Court of Appeals held that the detention and refusal to let Hughes leave did not result in an arrest. Because the brief investigatory stop did not become an arrest until after Hughes performed the field sobriety tests, the Court of Appeals concluded that *Miranda* warnings were not necessary before the conversations or the tests.

On February 8, 1989 we granted certiorari to consider whether the Court of Appeals was correct in reversing the trial court's determination that the officer effected an

arrest when he informed Hughes that he was not free to leave the scene of the initial stop.

1. The test for determining whether a person is "in custody" at a traffic stop is if a reasonable person in the suspect's position would have thought the detention would not be temporary. *Berkemer v. McCarty*, 468 U.S. 420, 442 (104 SC 3138, 82 LE2d 317) (1984). Because there is evidence in the record to support the trial court's determination that Hughes was arrested when he was told he was not free to leave, we will not disturb it. *State v. Louis*, 185 Ga. App. 529 (364 SE2d 896) (1988). Therefore, we reverse the Court of Appeals' determination that this was not an arrest.

2. Because the police did not give Hughes *Miranda* warnings at the time of the arrest, the trial court suppressed all conversations between the officers and Hughes after the officer told Hughes he was not free to leave. The trial court also suppressed all reference to the field sobriety tests.

a). In *Miranda v. Arizona*, 384 U.S. 436, 478 (86 SC 1602, 16 LE2d 694) (1966), the Supreme Court held that "when an individual is taken into custody . . . and is subjected to questioning, the privilege against self-incrimination is jeopardized." Because the trial court found that hughes was under arrest at the scene of the initial stop and the officer failed to give the required warnings, the trial court correctly suppressed reference to conversations between Hughes and the police.

b). Hughes' motions were based solely on the United States Constitution. He did not argue that the field sobriety tests should be suppressed under OCGA

§ 24-9-20. Therefore, we hold that the alphabet test and the physical dexterity tests are not inadmissible under the fifth amendment of the United States Constitution because they were not evidence of a testimonial or communicative nature. *Schmerber v. California,* 384 U.S. 757, 761 (86 SC 1826, 16 LE2d 908) (1966).

Judgment affirmed in part and reversed in part. All the Justices concur, except Marshall, C.J., who dissents to division 1 and the judgment of reversal.

Supreme Court, U.S.
FILED
JUN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-43

No. _____

In The

Supreme Court of the United States

October Term, 1989

JOHN ERIC HUGHES,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITIONER'S SUPPLEMENTAL APPENDIX

MELVIN S. NASH
204 Washington Avenue
Marietta, Georgia 30060
(404) 422-0878

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Dec 1, 1988

WHOLE COURT

In the Court of Appeals of Georgia

77370. THE STATE v. HUGHES. C-177

CARLEY, Judge.

Officer J. R. Barner, while off-duty and operating his own vehicle, was forced off the road by the erratic driving of appellee. Officer Barner followed appellee's vehicle and observed appellee commit numerous traffic offenses. When appellee eventually pulled into the parking lot of an apartment complex and stopped, Officer Barner followed and pulled in behind appellee's vehicle. Officer Barner approached appellee and identified himself as a police officer. Officer Barner was asked to produce his identification and he complied. At the request of Officer Barner, by-standers telephoned 911 to relay the report that an officer was in need of assistance in the parking lot of the apartment complex and, within three or four minutes, other officers arrived at the scene. During those few minutes before the other officers arrived, Officer Barner asked appellee for his driver's license and he engaged appellee in general conversation. At one point, appellee suggested he was simply going to drive away, but Officer Barner informed him that he would not be allowed to do so. Officer Robert Littler, who had arrived at the scene in response to Officer Barner's request for assistance, asked appellee to perform field sobriety tests. Based upon appellee's performance of those tests and the information supplied by Officer Barner, Officer Littler placed appellee under formal arrest for driving under the influence. At no

time prior to this formal arrest by Officer Littler was appellee ever advised of his *Miranda* rights.

Prior to trial, appellee filed a motion to suppress and a motion in limine. The trial court conducted a hearing and concluded that Officer Barner had "effected an arrest of [appellee] when he informed [appellee] that he could not leave the scene of the initial stop." Because appellee had not been given his *Miranda* rights at that time, the trial court granted appellee's motions, precluding the introduction at appellee's trial of any testimony concerning the conversation between appellee and Officer Barner which had occurred prior to the formal arrest and of any evidence of the field sobriety tests which had been conducted by Officer Littler prior to the formal arrest. The State appeals from this order of the trial court.

According to Officer Barner, he had followed the vehicle only to investigate the cause of appellee's erratic driving behavior and at no point had he arrested appellee. "[A] police officer may make 'an intrusion short of arrest' where he has 'specific and articulable facts' which reasonably warrant such intrusion." *Radowick v. State*, 145 Ga. App. 231, 233 (1) (244 SE2d 346) (1978). It is clear that Officer Barner had "specific and articulable facts" which warranted an investigation of appellee's erratic driving behavior. The trial court concluded, however, that, notwithstanding Officer Barner's testimony, the investigation had become an arrest when appellee was informed that he would not be allowed to drive away from the scene. This conclusion is erroneous. A detention of appellee was obviously necessary in order that the investigation of his erratic driving behavior could be conducted. The authority to investigate "specific and articulable

facts" without the authority to detain would be meaningless. "*Momentary detention and questioning are permissible* if based upon specific and articulable facts, which, taken together with rational inferences from those facts, justify a reasonable scope of inquiry not based on mere inclination, caprice or harassment." (Emphasis supplied.) *State v. Misuraca*, 157 Ga. App. 361, 364 (276 SE2d 679) (1981). Accordingly, the mere fact that appellee was detained from driving away from the scene of the authorized investigation of his erratic driving behavior would not authorize the conclusion that he was under arrest. "Although it is obvious that every arrest includes detention, not every detention is an arrest. . . ." *Radowick v. State*, supra at 238 (3). See also *Franklin v. State*, 143 Ga. App. 3, 5 (2) (237 SE2d 425) (1977), holding that "[a]n investigatory stop is not automatically an arrest simply because an officer is armed with a shotgun. [Cits.]"

The relevant inquiry is whether the detention to which appellee was actually subjected exceeded the limited scope of the detention to which the officers were authorized to subject him. "Although the original 'seizure' in the instant case was 'an intrusion short of arrest' ([cit.]), [we must determine whether] the subsequent actions of the police overreach[ed] the minimal intrusion authorized and convert[ed] the legal stop into an illegal arrest[.]" *Radowick v. State*, supra at 236 (3). Under the circumstances, Officer Barner was clearly authorized to effectuate "a brief stop, limited in time to that minimally necessary to investigate the allegation invoking suspicion, and limited in scope to identification, licensing of [the] driver and [the] vehicle if appropriate, a protective 'pat-down' of the outer surface of clothing for weapons if

[he had] reasonable apprehension that [appellee was] armed or dangerous, and limited questioning reasonably related to the circumstances that justified the initiation of the momentary stop. [Cits.]" *Radowick v. State*, supra at 237 (3). The undisputed evidence of record shows that, at no point prior to appellee's formal arrest, was his detention converted into an illegal arrest. The mere fact that appellee was detained by Officer Barner for three or four minutes pending the arrival of the on-duty officers did not result in an arrest. See generally *Green v. State*, 168 Ga. App. 558 (309 SE2d 687) (1983). The officer who initiates an investigation is obviously in the best position to determine whether the circumstances confronting him warrant the presence of other officers. This is especially true where, as here, the officer is not on duty and may lack both the means and the official authority to effect a formal arrest should that prove to be necessary. Moreover, appellee was not merely physically detained during the brief three or four minute period. Officer Barner used that period of time to identify appellee, to investigate appellee's driver's license and to engage in general conversation with appellee rather than to interrogate him. Such activities are clearly authorized during the brief investigatory stop of a motorist whose prior erratic driving could have been because of intoxication or could have been the result of a medical emergency or some other cause. Upon the arrival of Officer Littler, he took over the investigation and appellee was subjected to field sobriety tests. Such tests were reasonably related to those circumstances which had justified the initial detention of appellee. It was only *after* appellee had failed to pass the field sobriety tests and intoxication had been confirmed as the

probable explanation for his erratic driving that he was formally arrested.

"When a violator is placed in custody or under arrest at a traffic stop the protection of *Miranda* arises; however, roadside questioning at a routine stop does not constitute such a custodial situation. [Cit.]" *Lebrun v. State*, 255 Ga. 406, 407 (339 SE2d 227) (1986). The undisputed evidence of record shows only that appellee was subjected to a routine momentary detention for the purpose of investigating a possible traffic violation. As a result of the ensuing investigation, appellant was formally arrested for driving under the influence. It follows that the trial court erred in granting appellee's motions to suppress the introduction of the evidence which the State had acquired in full compliance with all applicable constitutional principles.

Judgment reversed. McMurray, P. J., Banke, P. J., Pope and Benham, JJ., concur. Beasley, J., concurs specially. Birdsong, C. J., Deen, P. J., and Sognier, J., dissent.

77370. THE STATE v. HUGHES. C-177

BEASLEY, Judge, concurring specially.

I agree with the result reached by the majority but by a different route.

The trial court did not grant defendant's motion in limine and motion to suppress entirely but did suppress "all reference to the field sobriety tests . . . as well as the contents of all discussions between [the uniformed officer] and the defendant with the exception of the implied consent warnings and the defendant's response thereto." The basis was that defendant had not been advised of his rights under *Miranda v. Arizona*, 384 U. S. 436 (86 SC 1602, 16 LE2d 694) (1966). The State challenges the suppression.

The ruling as to "statements" could only have related to the defendant's faulty performance of the alphabet field sobriety test, in which he could not recite the alphabet all the way through. There was no evidence of any other incriminating statement made by defendant. Barner testified that the only thing defendant spoke was a challenge to Barner's identity as a police officer and that he was going to leave. Littler did not testify about anything that defendant said other than what was expressly not suppressed and what defendant said in the alphabet test. So the question is reduced to whether the *Miranda* rights must be given before field sobriety tests are administered.

Not all in-custody statements are subject to *Miranda*. A volunteered statement, which is not the product of interrogation or its functional equivalent, would not be suppressible on this ground. *Rhode Island v. Innis*, 446 U. S. 291 (100 SC 1682, 64 LE2d 297) (1980). Or a statement

may not have been incriminating. *Hoffman v. United States*, 341 U. S. 479, 485-487 (71 SC 814, 95 LE 1118) (1950); *Axson v. Nat. Surety Corp.*, 254 Ga. 248, 250 (327 SE2d 732) (1985). The trial court would have had to know what the statement was and the circumstances under which it was made, to suppress it from introduction at trial. If some statement was in fact made but is not yet evidenced of record, then the ruling was premature.

As to the field sobriety tests, Officer Littler testified that in addition to the alphabet test, he gave several physical dexterity tests in which defendant was asked to perform specific movements using certain members of his body. Since he failed, these produced incriminating evidence.

As authority for his motions, defendant cited only *Berkemer v. McCarty*, 468 U. S. 420 (104 SC 3138, 82 LE2d 317) (1984). Thus his *Miranda* challenge was based on the federal constitution alone. It would not reach the field sobriety tests, because only statements, and not acts, are subject to the warnings in order to be admissible under Fifth Amendment standards. *Schmerber v. California*, 384 U. S. 757, 761 (86 SC 1826, 16 LE2d 908) (1966).

As to the "statement" made in response to Officer Littler's request that he "recite the alphabet all the way from A through Z as clearly and plainly as possible," an application of *Berkemer* leads to the conclusion that the federal right against self-incrimination was not violated. Although *Berkemer* dealt with roadside questioning of a motorist detained pursuant to a traffic stop rather than the administration of a field sobriety test which involved speech, the rationale is fundamentally the same. It is the

nature and the purpose of the detention and of the questions asked by the officer which primarily govern.

The Court stated: "It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' " Supra at 440. The Court recognized the distinction between the period of detention after the initial stop and the point at which the person is "subjected to restraints comparable to those associated with a formal arrest." Supra at 441. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Supra at 441. In determining that question, the Court noted that the police officer asked some questions and requested the suspect to perform a simple balancing test. Thus the fact that a field sobriety test is administered does not render the detention one of "custody" or arrest.

The Georgia Supreme Court relied on *Berkemer* in concluding that, under federal law, "roadside questioning at a routine stop does not constitute such a custodial situation [as to require *Miranda* warnings]" *Lebrun v. State*, 255 Ga. 406, 407 (3) (339 SE2d 227) (1986). In its analysis in *VanLoo v. State*, 187 Ga. App. 290370 SE2d 44) (1988), this Court regarded the field tests to have been performed prior to arrest. That is logical, since the field tests are an investigatory tool and their results may lead to a termination of the detention.

Under Georgia law, the affirmative acts requested of defendant as well as the alphabet statement would be subject to suppression if compelled. 1983 Ga. Const. Art 1, Sec. 1 Par. 16; OCGA § 24-9-20. A proper application of

these provisions and the cases construing and applying them would not lead to suppression here either. As analyzed in *Montgomery v. State*, 174 Ga. App. 95, 96 (1) (329 SE2d 166) (1985), "OCGA § 24-9-20 is inapplicable . . . because appellant was not a person charged in a criminal proceeding at the time he attempted to complete the [field sobriety tests]." Nor was there in *Montgomery* any violation of the state constitutional right against self-incrimination. The factors found wanting in that case are also absent here.

There was thus no basis in law to suppress the evidence.

77370. THE STATE v. HUGHES. (C-177)

DEEN, Presiding Judge, dissenting.

Because the majority opinion either substitutes its factual determination for that of the trial court or reaches an erroneous legal conclusion that the off-duty police officer had not effected an arrest of the appellee, I must respectfully dissent.

At the hearing, the police officer testified on cross-examination as follows: "A. He said, 'I'm going to get back in my vehicle and leave.' And I said, "No, sir. You're not going to do that.' If that's an arrest; that's an arrest. Q. Okay. Fine. So my question is as far as you were concerned he had broken the law; is that right? A. Yes, sir. He had broken the law. Q. He was not free to leave, was he? A. No, sir. I wouldn't have let him leave. Q. So for all intents and purposes, he was under arrest except you hadn't said the magic words. Is that basically what it amounted to? A. That is correct."

The majority opinion considers this case to be one merely involving a permissible investigatory stop. However, there appears to be little question that the off-duty police officer had concluded that the appellee had committed certain offenses for which he should be arrested, and had summoned other police officers to complete the arrest process. In short, at the point in time when the off-duty police officer indicated that the appellee could not leave, his investigation was over.

If something looks like an arrest, sounds like an arrest, and acts like an arrest, it probably is an arrest, regardless of whether or not one uses the magic word

itself. See *Chilvis v. Turner Communications Corp.*, 140 Ga. App. 648, 650 (231 SE2d 425) (1976) ("act, quack, and look like ducks"). The trial court's conclusion under its broad discretion that the off-duty police officer arrested the appellee is a realistic conclusion drawn from the evidence, and it is not clearly erroneous. Since a trial court's factual determinations after a suppression hearing must be accepted by the appellate courts where they are not clearly erroneous, *State v. Louis*, 185 Ga. App. 529 (364 SE2d 896) (1988), the trial court's order in this case should be affirmed.

I am authorized to state that Chief Judge Birdsong and Judge Sognier join in this dissent.

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-43

In The

Supreme Court of the United States

October Term, 1989

JOHN ERIC HUGHES,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Senior Assistant Attorney General
Counsel of Record for Respondent

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Assistant
Attorney General

WILLIAM B. HILL, JR.
Deputy Attorney General

SUSAN V. BOLEYN
Senior Assistant
Attorney General

C. A. BENJAMIN WOOLF
Staff Attorney

Please serve:
MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

Lex Publishing Company, 2161 Monroe Dr., Atlanta, Georgia 30324 (404) 875-5140

QUESTION PRESENTED

1.

Did the Supreme Court of Georgia properly conclude that the alphabet test and physical dexterity tests of a field sobriety test were admissible because they were not evidence of a testimonial or communicative nature?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT THE INSTANT PETITION BECAUSE THE RULING BY THE GEORGIA SUPREME COURT WAS A PROPER APPLICATION OF THE PRECEDENT OF THIS COURT 4

CONCLUSION 6

TABLE OF AUTHORITIES

CASES CITED PAGE(S)

Gilbert v. California, 388 U.S. 263 (1967) 5
Hughes v. State, 259 Ga. 227, __ S.E.2d __ (1989) 2, 4
Miranda v. Arizona, 384 U.S. 486 (1966) 4, 5
Pennsylvania v. Bruder, __ U.S.__, 109 S.Ct. 205 (1988) 5
Schmerber v. California, 384 U.S. 757 (1966) 4
State v. Hughes, 189 Ga. App. 671, 377 S.E.2d 192 (1988) 2, 3
United States v. Dionisio, 410 U.S. 1 (1973) 4, 5
United States v. Wade, 388 U.S. 218 (1967) 5

No. 89-43

In The

Supreme Court of the United States

October Term, 1989

JOHN ERIC HUGHES,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, John Eric Hughes, was charged in Cobb County, Georgia on October 17, 1987, with one count each of the traffic offenses of improper lane useage, improper passing, failure to obtain a Georgia driver's license, and driving under the influence. Prior to trial, Petitioner filed a motion in limine and a motion to suppress based upon his detention and subsequent arrest. The hearing was held on the motion in limine and motion to suppress on May 10, 1988. Following that hearing, the trial court issued an order granting the motion on May 23, 1988.

The state subsequently filed a notice of appeal to the Court of Appeals of Georgia on June 20, 1988.

On appeal, the state asserted that the trial court erred in granting the motion to suppress, focusing on the trial court's ruling that the roadside traffic stop constituted a custodial interrogation. After reviewing the case, the Court of Appeals of Georgia reversed the decision of the trial court concluding that the routine momentary detention occasioned by the traffic stop did not constitute a custodial situation. *State v. Hughes*, 189 Ga. App. 671, 377 S.E.2d 192 (1988). The Petitioner subsequently filed a petition for a writ of certiorari in the Supreme Court of Georgia. After reviewing the case, the Supreme Court of Georgia affirmed in part and reversed in part the ruling of the Court of Appeals of Georgia, holding that the trial court properly suppressed evidence of conversations between Petitioner and the police, but that the field sobriety tests were not inadmissible under the Fifth Amendment to the United States Constitution because they were not evidence of a testimonial or communicative nature. *Hughes v. State*, 259 Ga. 227, __ S.E. 2d __ (1989).

Petitioner has now filed the instant petition for a writ of certiorari to this Court challenging the decision of the Supreme Court of Georgia.

PART TWO

STATEMENT OF THE FACTS

The following facts were set forth by the Court of Appeals of Georgia in relation to the traffic stop in question:

> Officer J. R. Barner, while off-duty and operating his own vehicle, was forced off the road by the erratic driving of the appellee. Officer Barner followed

> appellee's vehicle and observed appellee commit numerous traffic offenses. When appellee eventually pulled into the parking lot of an apartment complex and stopped, Officer Barner followed and pulled in behind appellee's vehicle. Officer Barner approached appellee and identified himself as a police officer. Officer Barner was asked to produce his identification and he complied. At the request of Officer Barner, by-standers telephoned 911 to relay the report that an officer was in need of assistance in the parking lot of the apartment complex and, within 3 or 4 minutes, other officers arrived at the scene. During those few minutes before the other officers arrived, Officer Barner asked appellee for his driver's license and he engaged appellee in general conversation. At one point, Appellee suggested that he was simply going to drive away, but Officer Barner informed him that he would not be allowed to do so. Officer Robert Littler, who had arrived at the scene in response to Officer Barner's request for assistance, asked appellee to perform field sobriety tests. Based upon Appellee's performance of those tests and the information supplied by Officer Barner, Officer Littler placed Appellee under formal arrest for driving under the influence. At no time prior to this formal arrest by Officer Littler was appellee ever advised of his Miranda rights.

State v. Hughes, 189 Ga. App. at 671.

The field sobriety tests at issue consisted of a recitation of the alphabet from A to Z and two physical dexterity tests.

Further facts will be developed as necessary to examine issues presented in the instant petition for a writ of certiorari.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT THE INSTANT PETITION BECAUSE THE RULING BY THE GEORGIA SUPREME COURT WAS A PROPER APPLICATION OF THE PRECEDENT OF THIS COURT.

Petitioner's question does not present a basis for granting certiorari by this Court. Notwithstanding Petitioner's assertions to the contrary Respondent submits that the Georgia Supreme Court properly ruled that the field sobriety test, and particularly the "alphabet test" portion at issue in this petition was "not inadmissible under the fifth amendment of the United States Constitution because they were not evidence of a testimonial or communicative nature. *Schmerber v. California*, 384 U.S. 757, 761 (86 SC 1826, 16 LEd 2d 908) (1966)." *Hughes v. State*, 259 Ga. 227, 228, __ S.E.2d __ (1989).

Each component of the field sobriety test is a non-communicative "display of identifiable physical characteristics," not protected by *Miranda's* prophylactic application of the privilege against compulsory self-incrimination. *Miranda v. Arizona*, 384 U.S. 486, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). *United States v. Dionisio*, 410 U.S. 1, 5-6, 93 S.Ct. 764, 767, 35 L.Ed. 2nd 67, 74-75 (1973). The alphabet test, particularly at issue in the present action, is "used solely to measure the physical properties of the [witness' voice], not for the testimonial or communicative content of what was to be said," in the instant case the degree of Petitioner's intoxication. *Dionisio*, 384 U.S. at 7.

Respondent submits therefore that the "alphabet test" simply requires a driver to submit their voice for examination, much

like the accused bank robber in *United States v. Wade*, 388 U.S. 218 (1967) was forced to utter in a lineup words that had allegedly been spoken by the robber, and so was "required to use his voice as an identifying physical characteristic, not to speak his guilt." *Wade*, 388 U.S. at 222-223. Similarly, handwriting and voice examplars, although a means of communication, have been held by this Court not to be testimonial in nature and thus not protected against compulsory self-incrimination. *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Dionisio*.[1] Respondent notes in addition that Petitioner conceded in his original motion in limine and motion to suppress before the trial court that the Petitioner was allegedly compelled to "perform several *non-communicative acts* such as *saying the alphabet*; the finger to the nose tests; etc. ... against his will which incriminated this Defendant." (R. 13; emphasis supplied).

---

[1] Respondent notes that in a recent case on similar facts this Court specifically declined to "reach the issue of whether recitation of the alphabet in response to custodial questioning is testimonial and hence inadmissible under *Miranda v. Arizona*, 384 U.S. 436, S.Ct. 1602, 16 L.Ed. 2d 694 (1966)." *Pennsylvania v. Bruder*, __ U.S. __, 109 S.Ct. 205, 207 n. 3, 102 L.Ed. 2d 172, 177 n. 3 (1988).

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that the petition for a writ of certiorari filed on behalf of John Eric Hughes be denied.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
Executive Assistant
Attorney General

WILLIAM B. HILL, JR. 354725
Deputy Attorney General

SUSAN V. BOLEYN 065850
Senior Assistant
Attorney General

MARY BETH WESTMORELAND 750150
Senior Assistant
Attorney General

C. A. BENJAMIN WOOLF 775990
Staff Attorney

Please serve:
MARY BETH WESTMORELAND
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3349